IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
HAROLD HOOD, PRESIDING JUDGE

TERESA COX, as Next Friend of BRANDON COX, a Minor, TERESA COX, and CAREY COX, Individually,

Plaintiff-Appellees,

-vs-

Docket No. 118110
Court of Appeals No. 205025
Genesee Circuit No. 92-12247-NM

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant,

SUPREME COURT

MAY 2002

TERM

Brief On Appeal - Appellant

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JURISDICTION OF THE SUPREME COURT

Jurisdiction is vested in the Supreme Court pursuant to MCR 7.301(A)(2) and this Court's January 15, 2002 Order granting Defendant-Appellant, Hurley Medical Center's, Motion for Reconsideration of this Court's Order of July 10, 2001, which vacated the July 10, 2001 order and granted leave to appeal.

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STATEMENT OF QUESTIONS INVOLVED

I DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE TRIAL COURT'S REVERSIBLE ERROR BY ITS GROSS DEVIATION FROM SJI2d 30.01 WHICH DEPRIVED DEFENDANT OF A FAIR TRIAL AND IF ALLOWED TO STAND WOULD BE INCONSISTENT WITH SUBSTANTIAL JUSTICE?

Defendant-Appellant answers "Yes."

II DID THE COURT OF APPEALS ERRONEOUSLY AFFIRM THE TRIAL COURT'S APPLICATION OF A NATIONAL STANDARD OF CARE TO NONSPECIALISTS, I.E., THE HOSPITAL'S NURSES AND, THEREBY, IMPERMISSIBLY ALLOWED UNQUALIFIED TESTIMONY OF PLAINTIFF'S EXPERTS, MODANLOU AND CRAWFORD?

Defendant-Appellant answers "Yes."

III DOES AN AMALGAMATION OF MISSTATEMENTS OF LAW AND FACTS COUPLED WITH APPELLATE INSUBORDINATION IN THE GUISE OF UNWARRANTED ATTACK ON DEFENSE COUNSEL RENDER NUGATORY ANY LEGAL VALIDITY TO THE MAJORITY'S OPINION AND IF ALLOWED TO STAND BE INCONSISTENT WITH SUBSTANTIAL JUSTICE?

Defendant-Appellant answers "Yes."

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STATEMENT OF FACTS

Plaintiffs-Appellees, Teresa Cox, as Next Friend of Brandon Cox, a minor, and Teresa Cox, Individually (hereinafter "Plaintiffs"), claimed that NICU Nurse Martha Plamondon negligently allowed an umbilical arterial catheter (UAC) to become dislodged. Defendant-Appellant, Hurley Medical Center (hereinafter "Defendant"), was to be held vicariously liable for this alleged malpractice.

Brandon Cox was born severely premature on February 8, 1990, at 27 weeks gestation and weighing 900gm (TT, Vol IV, p 591). A UAC was inserted into his abdomen shortly after birth on February 8, 1990 at 2:20 p.m. (TT, Vol IV, p 590). The UAC line is placed to allow frequent obtaining of blood to calculate blood gasses and treat by ventilator a premature baby's immature lungs. The UAC line is secured by taping it to the child. These lines are not sutured to the baby but suture line is wrapped around the catheter as part of the securing process. (TT, Vol IV, pp 603-604.)

Per routine, an x-ray is taken to determine the appropriate placement for the UAC line, then adjusted, if necessary. It was adjusted by neonatologist, Brian Nolan, M.D., by withdrawing it 2cm upon initial insertion on February 8. (TT, Vol IV, p 590). On orders from another treating neonatologist, Dr. Aranas, Nurse Edith Ann Krupp adjusted the catheter in the same manner on February 9, 1990, at 2:20 a.m. The UAC line was then re-taped. (TT, Vol IV. pp 670-679). Between that adjustment and the last nursing entry of the allegedly negligent actor, Nurse Martha Plamondon, prior to the UAC line being dislodged at 4:20 p.m. on February 10, there were 89 documented instances of monitoring the line and 26 withdrawals of blood from the UAC line.

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At 4:00 p.m. on February 10, Nurse Plamondon repositioned the infant and checked the UAC line for proper securing. She also withdrew blood. At 4:20 p.m., the UAC line was discovered dislodged. (TT, Vol III, pp 357-358). A blood loss of approximately 40ccs was discovered (TT, Vol III, p 361). Nurse Plamondon immediately addressed the clinical situation by administration of Plasmanate and later, packed red blood cells. (TT, Vol III, p 384).

No cardiac or respiratory alarm sounded which would have indicated immediate danger to the infant. (TT, Vol III, p 417). Arterial blood gas readings immediately after the incident demonstrated that the blood loss did not have a clinically significant impact on the child's well-being. (TT, Vol III, pp 407-409). Prior to the blood loss incident, the child's course through the third day was characterized by his treaters as unstable. (TT, Vol III, p 412). This included a significant incident on February 9, the day before the blood loss incident. (TT, Vol III, pp 413-414).

On February 11, 1990, the child was transported to Children's Hospital due to the discovery of air in the abdomen and for a workup for a suspected perforated bowel. The child later developed intraventricular hemorrhages which are common to this level of premature infants. He was then diagnosed as suffering from cerebral palsy. Evaluations of the child at the time of trial (age 4) indicated that the child would develop at a low normal educable IQ and would most probably be employed at a minimum wage job. (TT, Vol II, pp 101-102).

By the Complaint, discovery and Plaintiff's counsel's admission during trial (TT, Vol I, p 49) the sole allegation was whether Nurse Plamondon, the nurse on duty at the time the UAC line was discovered dislodged, committed malpractice by "allowing" the

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UAC line to come out. Further, Plaintiff's theory alleged that the blood loss either caused an ischemic result, or disruption of an autoregulatory mechanism of blood perfusion which caused intraventricular bleeds (TT, Vol I, pp 28-30).

Defendant maintained that, although uncommon, a UAC line can dislodge without any type of malpractice whatsoever. This was even acknowledged by Plaintiff's expert, Houchang Modanlou, M.D. (Modanlou, p 59). Further, the blood loss incident demonstrated no clinically significant impact per the results of arterial blood gas readings (TT, Vol III, pp 408-409). Finally, it is statistically very common for a 900gm, 27 week gestational aged severely premature infant to develop exactly the type of neurological deficit this child demonstrated. (TT, Vol V, pp 699,713,720).

After a two-week trial in the Genesee County Circuit Court before Judge Earl Borradaile in May, 1994, a jury found in favor of Plaintiffs, awarding $2.4 Million. (TT, Vol VII, p 876). Judgment was entered on June 13, 1994. On July 11, 1994, Defendant filed a Motion for Judgment Notwithstanding the Verdict and for New Trial, and in the Alternative, Remittitur. On August 29, 1994, the trial court granted a new trial, entering its "Order Re: New Trial; Remittitur" on September 15, 1994. The new trial Order was based on Plaintiff's failure to demonstrate causation-in-fact evidence sufficient to support a verdict regarding the cause of the UAC dislodgement, with the Court relying on Skinner v Square D. Co., 445 Mich 152 (1994).

At the end of its ruling, the Court inquired as to the mediation amount. It then gave Plaintiffs the option of accepting a remitted amount of $475,000 in lieu of proceeding to a new trial.

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Plaintiffs filed their Application for Leave to Appeal on October 6, 1994. On December 14, 1994, the Court of Appeals, in CA No. 179366, entered its Order vacating the September 15, 1994 Order and remanding the matter to the Genesee County Circuit Court for reconsideration of the motion for a new trial. The trial court also was instructed to prepare a detailed opinion in the event it deemed remittitur appropriate.

On remand, the trial court issued a new opinion on February 2, 1995, granting judgment in favor of the Defendant for judgment notwithstanding the verdict of no cause of action, and in the alternative, granting a new trial. On March 30, 1995, the trial court entered its "Order Granting Judgment Notwithstanding the Verdict of No Cause of Action on Behalf of Defendant Hurley Medical Center; Conditionally Granting a New Trial if the Judgment is Vacated or Reversed."

On April 10, 1995, Plaintiffs filed a Claim of Appeal from this Order. In its Brief on Appeal, Defendant argued in support of the March 30, 1995 Order and additionally and alternatively, in Issue III raised significant errors of law which occurred which mandated a new trial but were not addressed by the trial court.

On November 22, 1996, the Court of Appeals in CA No. 184859 issued its unpublished, per curiam Opinion reversing the Circuit Court's March 30, 1995 Order. In its Opinion, the Court of Appeals addressed the claimed errors cited in Issue III of Defendant's Brief on Appeal in two sentences:

> Although defendant asserts in its brief on appeal that other issues warranted a new trial, these claims were not raised by way of a cross-appeal. Accordingly, review of these issues is precluded. Barnell v Taubman, Inc., 203 Mich App 110, 123; 512 NW2d 13 (1993).

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While addressing the March 30, 1995 Order, the Court of Appeals gave no direction to either the parties or the trial court as to whether the original June 13, 1994 Order of Judgment was reinstated, or if the parties were to prepare a new judgment in accordance with the Court's decision. No order of remand was given.

On December 5, 1996, Defendant filed a Motion for Rehearing alleging that the Court's implied requirement to cross-appeal was palpable error and a disregard of applicable case law.

On January 14, 1997, the Court of Appeals entered its Order Denying Defendant's Motion for Rehearing.

Defendant filed a Claim of Appeal on January 29, 1997. It was assigned CA No. 200943. On February 19, 1997, the Court of Appeals notified defense counsel of a "defect" by assuming that Defendant had omitted a copy of a Circuit Court Order entered between January 14, 1997 and January 30, 1997. On March 11, 1997, defense counsel replied to the Court, indicating that no defect existed because the Circuit Court took no action between January 1, 1997 and January 30, 1997.

Defendant filed its Brief on Appeal on March 27, 1997. This Brief raised four allegations of error by the trial court, the merits of which were eventually addressed much later by Judge Griffin in his dissent to the per curiam opinion of April 6, 1999 in Docket No. 205025.

Plaintiffs also filed a Brief on Appeal and moved to dismiss the Appeal premised upon the untimeliness of the Claim of Appeal and the failure to file a cross-appeal.

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Defendant answered the Motion to Dismiss contending the Claim of Appeal was timely. Further, having obtained a JNOV and having no basis or need to seek more favorable relief, was not required to file a cross-appeal.

On June 11, 1997, the Court of Appeals entered its Order in CA No. 200943 stating:

> This case is DISMISSED for failure to pursue the case in conformity with the rules. MCR 7.216(A)(10). The Clerk of this Court provided notice as to the nature of the defect in this filing, and the defect was not corrected in a timely manner. Dismissal was **without prejudice** to whatever other relief may be available consistent with the Court rules.
>
> The Motion to Dismiss is DENIED as moot.
> [Emphasis added].

Upon receipt of this Order, defense counsel contacted the Court of Appeals to determine the precise nature of the "defect." Defense counsel was informed that the defect was the failure to file a Circuit Court order which reflected the Court of Appeals Opinion of November 22, 1996. They were further informed that an order was necessary for the filing of an appeal as of right.

Defendant then filed a motion to enter an order in conformity with the Court of Appeals Opinion in the trial court. This Motion was originally scheduled to be heard June 30, 1997, adjourned to July 7, 1997, and again over to July 21, 1997, due to the schedule of the Court and Plaintiff's counsel.

Prior to this time, however, Plaintiff filed a Motion in the Court of Appeals for Damages pursuant to MCR 7.216(C). Defendant answered this Motion on July 15, 1997. By Order of October 30, 1997, the Court of Appeals denied Plaintiff's Motion for Damages.

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On July 21, 1997, the Honorable Geoffrey L. Neithercut (Judge Borradaile's successor) of the Genesee County Circuit Court heard oral argument on Defendant's Motion. Judge Neithercut agreed with Defendant's arguments and entered the "Order Re: Reversal of JNOV and Entry of Judgment in Conformance with Michigan Court of Appeals Opinion dated November 22, 1996," on July 1, 1997. On July 24, 1997, Defendant filed its Claim of Appeal from the July 21, 1997 Order.

On August 1, 1997, Plaintiffs filed a Cross-Appeal from the same Order.

Plaintiffs then filed a second Motion to Dismiss Claim of Appeal, together with a Motion for Immediate Consideration thereof. Defendant timely answered these Motions on August 14, 1997.

Plaintiffs also filed a Motion to Correct and Strike Pleadings, which Defendant again timely answered on September 2, 1997. By letter of October 30, 1997, the Court of Appeals returned Plaintiff's Motion to Strike as it could not be forwarded to the panel prior to their consideration of the Motion to Dismiss.

Defendant timely filed its Brief on Appeal on November 12, 1997. Defendant again raised the four allegations of error by the trial court resulting in the jury verdict, the merits of which had **never** been addressed by an appellate panel or by the trial court in granting the March 30, 1995 Order. Plaintiffs filed a brief on cross-appeal dated December 12, 1997. Defendant filed a reply on January 16, 1998.

By Order dated January 28, 1998 a Court of Appeals panel (Judges Jansen, Griffin and Smolenski) granted Plaintiff's Motion for Immediate Consideration, **denied** the Motion to Dismiss, and denied the Motion to Correct and Strike Pleadings. Plaintiffs thereafter filed a Motion for Rehearing of the denial of the Motion to Dismiss which

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Defendant answered. On March 5, 1998, the Court of Appeals entered its Order denying Plaintiff's Motion for Rehearing.

On March 23, 1998, Plaintiff filed an Application for Leave to Appeal to this Court from the denial of the Motion to Dismiss. Defendant answered the Application for Leave to Appeal on April 13, 1998.

On October 13, 1998, the Court of Appeals provided notice to the parties that oral argument would take place on November 3, 1998. On October 19, 1998, Plaintiff filed in this Court a "Motion for Immediate Consideration of Application for Leave to Appeal or, in the Alternative, to Stay Proceedings in the Court of Appeals and Adjourn Oral Argument." Defendant timely answered the Motion on October 23, 1998.

Oral argument was heard in the Court of Appeals on November 3, 1998.

By December 22, 1998 Order, this Court granted Plaintiff's Motion for Immediate Consideration of its Application and **denied** the Application because it was not persuaded that the questions presented should be reviewed by the Court.

On April 6, 1999, the Court of Appeals, in CA No. 205025, entered its per curiam opinion. The majority of the Court (Judges Hood and Markey) dismissed Defendant's Appeal and vacated the July 21, 1997 Judgment. The trial court was ordered to enforce the June 13, 1994 Judgment, holding that Defendant was required to file a cross-appeal. In dissent, Judge Griffin held a cross-appeal was not required to raise the underlying issues of this case, and indicated he would have reversed and remanded for a new trial.

On April 27, 1999, Defendant filed its Application for Leave to Appeal to this Court, arguing that the Court of Appeals erred in dismissing Defendant's Appeal for

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failure to file a cross-appeal and in refusing to consider the trial court's reversible errors. In Cox v Flint Board of Hospital Managers, 462 Mich 859 (2000), this Court entered its Order remanding the case to the Court of Appeals for a ruling on the issues "which Defendant has properly and persistently raised." This Court determined that the Court of Appeals erred in refusing to review the four arguments raised by the Defendant on the erroneous ground that Defendant was required to file a cross-appeal to raise them. Cox, 462 Mich at 859-860. This Court also held that it would be unjust for the Court to refuse to rule on the issues. Cox, 462 Mich at 860.

On October 27, 2000, the Court of Appeals, without further oral argument or briefing, issued its for-publication Opinion affirming the Judgment entered in the trial court. Again, Judges Hood and Markey were in the majority, with Judge Griffin filing a dissent, as outlined above. Cox v Flint Board of Hospital Managers (on remand), 243 Mich App 72 (2000).

Defendant then filed an Application for Leave to Appeal to this Court on November 17, 2000. Defendant's application contended that the Court of Appeals opinion and holding in Cox, supra, violated the most basic tenets of medical malpractice law in the following ways:

> 1. By affirming a 30.01 SJI2d instruction which misidentifies the alleged tortfeasor as "the neonatal intensive care unit", it fails to understand the very nature of a medical malpractice claim, i.e., there must be a physician (healthcare provider)-patient relationship which gives rise to a legal duty concerning an applicable standard of care. It is that duty which is alleged to have been breached to proximately cause an injury -- basic tort law. "Units" or "teams" do not and cannot render care under this basic element of a cause of action. These constitute

organizational constructs, which have no legal standing. Each "unit" can be comprised of varying types of healthcare providers, each of whom has its own applicable standard of care which they are obligated to render to a patient.

2. By affirming the trial court's ruling that a national standard of care applies to nurses, the majority directly contravened basic malpractice law in this state and is in direct conflict with this Court's holding in Bahr v Harper Grace Hospital, 448 Mich 135 (1995) and MCL 600.2912a.

Notwithstanding, by Order of July 10, 2001, this court denied the Application for Leave to Appeal, "...because we are not persuaded that the questions presented should be reviewed by this court." Justices Corrigan, Taylor and Young would have granted leave to appeal.

On July 31, 2001, Defendant filed a Motion for Reconsideration of Leave-Denial Order. While that motion was pending, both the Michigan Hospital Association ("MHA") and the Michigan State Medical Society ("MSMS"), filed Motions for Leave to File an Amicus Curiae Brief, because the issues extant in the appeal were vital to the State's medical malpractice jurisprudence. Plaintiff answered the Motion for Reconsideration and the Motions for Leave to File Amicus Curiae Briefs.

By order of January 15, 2002, this court granted the Motions for Leave to File Amicus Curiae Brief; granted Defendant's Motion for Reconsideration; vacated the Order of July 10, 2001; and granted Leave to Appeal.

Those additional facts that relate to the issues on appeal are discussed further in the argument portion of this brief.

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ARGUMENT

ISSUE I

THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S REVERSIBLE ERROR BY ITS GROSS DEVIATION FROM SJI2d 30.01 WHICH DEPRIVED DEFENDANT OF A FAIR TRIAL AND IF ALLOWED TO STAND WOULD BE INCONSISTENT WITH SUBSTANTIAL JUSTICE.

Standard of Review

Inappropriate jury instructions are reviewed *de novo* on an abuse of discretion standard, and more particularly reversal is required where failure to reverse would be inconsistent with substantial justice. Johnson v Corbet, 423 Mich 304 (1985); Case v Consumers Powers, Co., 463 Mich 1, 6 (2000).

The trial court committed blatant reversible error by grossly deviating from SJI2d 30.01. While all instructions are important, in a medical malpractice case, none is more critical than 30.01. It is intended to identify accurately the alleged tortfeasor and inform the jury by what standard this type of health care provider is to be judged. The given instruction did neither!

Standard Jury Instruction SJI2d 30.01 provides:

> When I use the words "professional negligence" or "malpractice" with respect to the Defendant's conduct, I mean the failure to do something which a _____ (name profession) of ordinary learning, judgment or skill in [this community or a similar community/_____ (name particular specialty)] would do, or the doing of something which a _____(name profession) of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.

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> It is for you to decide, based upon the evidence, what the ordinary _____ (name profession) of ordinary learning, judgment or skill would do or not do under the same or similar circumstances.

Over objection, (Vol. VI, p 781-783) the trial court inserted "neonatal intensive care unit" in the blank denominated for "name of profession." In the first paragraph of the instruction it completely omitted the indispensable phrase "of ordinary learning, judgment or skill in this community or a similar one." In the second paragraph the court omitted the sole modifier "ordinary" by which the jury is to measure the "learning, judgment or skill" of the alleged negligent health care provider. In doing so, the trial court grossly deviated from the standard instruction and gutted the gravamen of this most critical information by which the jury decides the case.

A. Misidentifying The Alleged Negligent Health Care Provider

The majority's affirmation of the trial court's insertion of "neonatal intensive care unit" into 30.01 reveals a total lack of understanding of the very nature of a malpractice claim. The most basic concept of the malpractice case is that a duty by a particular healthcare provider only arises from a physician/healthcare provider-patient relationship. As in a garden variety negligence claim, the claim arises from an allegation that a duty was breached which was a proximate cause of injuries. In Hill v Kokosky, 186 Mich App 300 (1990), this hornbook law was set forth clearly as follows:

> The existence or nonexistence of a legal duty is a question of law for the court to decide. See Moning v Alfono, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Duty is essentially a question whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. (Cite omitted) Without a legal duty there is no actionable negligence. (Cite omitted)

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> In physician malpractice cases, the duty owed by the physician arises from the physician-patient relationship. Rogers v Horvath, 65 Mich App 644, 647; 237 NW2d 595 (1975), lv den 396 Mich 845 (1976). Accordingly, a professional physician-patient relationship is a legal prerequisite to basing a cause of action in professional malpractice against a physician. See Rogers, supra, p 646. A physician-patient relationship exists where a doctor renders professional services to a person who has contracted for such services. Rogers, supra, p 646-647. (Cite omitted). Hill, 186 Mich App at 302-303.

Similarly in Weaver v U of M Board of Regents, 201 Mich App 239, 242 (1993), the Court of Appeals repeated this basic law as follows:

> It is hornbook law that no cause of action for negligence *exists unless the defendant owes a legal duty to the plaintiff* (cite omitted). The term "malpractice" denotes a breach of the duty owed by one rendering professional services to a person who was contracted for such services. Hill v Kokosky, 186 Mich App 300, 303; 463 NW2d 265 (1990); Malik v William Beaumont Hospital, 168 Mich App 159, 168; 423 NW2d 920 (1988). A professional physician-patient relationship is a legal prerequisite of a cause of action for medical malpractice. Hill, supra at 303.

In NBD Bank v Barry, 223 Mich App 370 (1997), the Court of Appeals affirmed the lower court's grant of summary disposition to the Defendant physician because a physician-patient relationship was not established. The requisite relationship did not exist in spite of the fact the Defendant doctor read an EKG of the decedent, which the court indicated was part of his "routine" duties as a member of the Department of Internal Medicine. NBD Bank, 223 Mich App at 373. Since the physician never treated the decedent, no duty was owed and liability could not attach. Id.

Plaintiff's lead counsel co-authored a well-regarded treatise in this field entitled Schwartz and Tucker, Handling Birth Trauma Cases. At the outset, the authors nicely

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define the term as follows: "malpractice is the liability which the law imposes on the professional acts of a person licensed to practice a specialized calling." See Vol. I, p 44.

It is also hornbook law that hospitals are subject to legal responsibility in only one of two ways. Firstly, as a legal entity vicariously liable for an employee or agent for whom it is legally responsible under general agency principles. Until the mid-twentieth century, hospitals were actually exempt from the legal doctrine of Respondeat Superior. In the landmark case of Bing v Thunig, 2 NY2d 656; 143 NE2d 3 (1957) the New York court commented on the changing roles of hospitals and held in pertinent part:

> Hospitals should, in short, shoulder the responsibilities borne by everyone else. There is no reason to continue their exemption from the universal rule of Respondeat Superior. The test should be, for these institutions, whether charitable or profit making, as it is for every other employer, was the person that committed the negligent injury producing act one of its employees and, if he was, was he acting within the scope of his employment.

In citing Bing, supra, the Michigan Supreme Court in Grewe v Mount Clemens Hospital, 404 Mich 240 (1978), dealt with the parameters of a hospital becoming legally responsible for an ostensible agent. In Grewe, the court dealt with the issue of whether a hospital was going to be vicariously liable for the treatment of a particular physician. The issue was whether that physician was an employee or agent for which the hospital could be found legally responsible. The hospital contended that the particular physician merely had staff privileges and was not an employee of the hospital and therefore no agency relationship could be found to exist to hold the hospital liable. Grewe, 404 Mich at 250. In setting forth the parameters of ostensible agency under that circumstance,

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the court did reiterate the basic rule of law that a "hospital is not vicariously liable for the negligence of a physician who is an independent contractor and merely uses the hospital's facilities to render treatment to his patients." Id. The underlying premise, however, was clear. The hospital's liability attaches under this circumstance only by way of a theory of Respondeat Superior. (See SJI2d 30.30 which states in pertinent part: "a hospital is not generally responsible for the professional negligence of a physician-healthcare provider who has staff privileges at the hospital but is not an agent or employee of the hospital.")

The only other theory of attaching legal responsibility to a hospital is by way of a direct corporate negligence claim, i.e., alleged negligent failure to appropriately investigate the competency of an independent physician to whom staff privileges have been granted or failure to promulgate policies which, if in place, would have effected the outcome of a particular claim. This theory is totally irrelevant to this case. The record is devoid of any such claim or proofs. Hurley Medical Center was the sole defendant being sued under a Respondeat Superior theory for the alleged acts of malpractice committed by its neonatal nurse employee Plamondon.

In Danner v Holy Cross Hospital, 189 Mich App 397, 398-399(1991), the Court of Appeals stated:

> Despite plaintiff's attempt to characterize this claim as one of corporate negligence, his claim is, in fact, one for medical malpractice... **The only way a hospital can render treatment is through its nurses and physicians**. [Emphasis added].

Again, plaintiff's lead counsel in his treatise under Section 4.18 entitled "Standard of Care of Hospitals-Generally" explains:

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> As a corporate entity, it may be held vicariously liable for the wrongful acts of its own employees and agents...Other employees, such as nurses, residents, and interns are licensed professionals who may provide medical care and treatment to patients, sometimes exercising their own independent medical judgment while at other times acting under the direct supervision and control of the patient's private physician...Each particular circumstance may call into play a different standard of care. Vol. 1, pp 68-69.

While these are the most basic concepts of medical malpractice law, neither the majority nor the trial court seemed to grasp them. Under Michigan law a "unit" is legally incapable of rendering medical care. It is merely an organizational construct by which hospitals organize varying professionals who, in turn, have varying applicable standards of care for each's field within the health care universe. There are numerous such groupings under a hospital's roof. Examples include coronary care units, labor and delivery units, psychiatric wards, radiology departments; the list is as long as an organizational chart. Each has varying types of professionally skilled persons who may treat patients in those units. But one cannot sue them collectively since the patient does not enter into a legal relationship with a "unit," "ward" or "team." The duty arises only when a relationship between **each** health care provider and the patient is established. Then each health care provider has a duty to render treatment in accordance with the applicable standard of care for that particular health care professional.

The majority asserts that the trial court properly "inserted the neonatal intensive care unit to reflect the theory of Plaintiff that was supported by the evidence." Cox, 243 Mich App at 83. It, inexplicably, in fn 4, asserts that evidence was presented to the jury that the "unit" referred to individuals, including nurses, neonatologists, residents and

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respiratory therapists. Cox, 243 Mich App at 85. It even asserts that the insertion of the term "unit" into the instruction reflects, "the theory of the Plaintiff that was supported by the evidence." Cox, 243 Mich App at 84. Finally, it asserts that the "instruction was properly modified to reflect Plaintiff's theory of the case." Id. These assertions are both factually and legally false.

The fact that there was testimony explaining what a neonatal intensive care unit is, is legally irrelevant to a cognizable cause of action for malpractice in this state and how that should be reflected in the jury instruction. The assertion that this theory was supported by the evidence is simply false. The undersigned challenges any reader of this record to cite one word by either of Plaintiff's experts that a neonatologist or a resident breached any applicable standard of care which was a proximate cause of the injuries claimed in this case. The record is totally devoid of any such testimony.

Finally, the whole notion that the term "unit" has legal relevance completely ignores the obvious implication of its very definition. An NICU is, by definition, comprised of varying, and not consistent, or equivalent types of professionals. These may, at any one time, include neonatologists, physicians that are in a neonatology fellowship (subspecialty training), physicians at 3 or 4 different levels of training in residency, nurse practitioners, registered nurses, licensed practical nurses, respiratory therapists, nurses aides, etc. The unit may or may not have all of these professionals in play at any one time. By definition, each is governed by separate standards of care both medically and legally [a neonatologist, as a specialist, is held legally to a national standard of care; the remaining purported members of the unit are considered non-specialists under the law (nurses, residents, respiratory therapists) to which the locality

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rule is legally applicable - see Issue II.] Therefore, to refer to a "unit" in a 30.01 instruction constitutes a legal nullity which cannot possibly convey to the jury an accurate identification of the health care providers at issue nor the standard of care applicable to each.

The Defendant cannot ignore the majority's incredible suggestion that the Defendant should have made a request to modify the term "unit" to list all of the professionals who can comprise the unit. On what basis would any party ask for this modification? Certainly Defendant is not in the habit of adding possible Defendants against itself even if there were proofs to support it. In light of the fact that the record is completely devoid of any such proofs regarding physicians, the majority's assertion in light of its analysis can only be deemed the height of chutzpah. Even Plaintiff did not so request.

Since Cox, another appellate panel has appropriately held in a diametrically opposite way. In Tobin v Providence Hospital, 244 Mich App 626 (2001), the Court of Appeals reversed a $6 million malpractice award, *inter alia*, on the basis that the SJI2d 30.01 instruction failed to specify the alleged tortfeasors -- the exact issue before this court.

In Tobin, the trial court SJI2d 30.01 instruction identified the alleged health care tortfeasor as "hospitals, agents/servants/employees" (directly analogous to the trial court in this case substituting the proposed identity of a neonatal nurse with the neonatal intensive care unit). The defendant, of course, objected and requested that the instruction reflect each individual category of medical specialty against whom the plaintiff was making claims so as to properly identify those for the jury, as well as utilize

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the appropriate standard of practice language. Tobin, 244 Mich App at 672. (Defendant in the instant case similarly proposed an instruction which identified the neonatal nurse practitioner as the alleged tortfeasor and as the only health care provider against whom there was plaintiff expert testimony.) See Appendix p 121a.

In holding that the trial court committed reversible error, the Tobin court reaffirmed basic malpractice law, i.e., different categories of health care providers have different standards of practice applicable to each. It is, therefore, necessary to specify and identify each category to a jury if those allegations have been supported by *prima facie* evidence in the Plaintiff's case in chief. Otherwise, the jury would have no information as to the identity of the category of the medical specialty at issue, nor have information as to the appropriate standard of practice applicable to each. The use of the generic phrase of "hospitals, agents/servants/employees" was obviously not sufficient to do so. Tobin, 244 Mich App at 673.

Importantly, the Tobin court specifically rejected the legal standing of Plaintiff's expert's testimony that a national standard of care was applicable to a hospital staff (this is in obvious conflict with Judge Hood's misplaced reliance on Plaintiff's expert's testimony that a national standard of care applied to a neonatal intensive care unit). Tobin, 244 Mich App at 672, fn 24. The Tobin court further held that the generic instruction failed to inform the jury which standard of practice would be applicable to each category of medical specialty at issue.

In rejecting this generic language, the panel stated specifically:

> [I]t permitted the jury to find that for example, the nurse anesthetist violated the standard of care applicable to a critical care unit physician. The standard instruction is

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> sufficient to inform the jury of the definitions of "professional negligence" and "malpractice" in the ordinary case involving one or two named defendants. However, in this case plaintiff chose to bring suit against the hospital and its (unnamed) agents, servants, or employees. **Thus, it was incumbent on the trial court to ensure that the jurors clearly understood how they were to determine whether any of defendant's employees committed professional negligence or malpractice under the particular standard of practice applicable to their specialty. The unmodified standard instruction did not fulfill that function.** [Emphasis added] Tobin, 244 Mich App at 673.

After citing this Court's decision in Johnson v Corbet, 423 Mich 304, 326-327 (1985), the Tobin court went on to explain as follows:

> Different standards of practice were applicable to the various employees who were inferentially the subject of plaintiff's lawsuit. The trial court used a general instruction that failed to differentiate between the various standards of practice that were applicable to these employees. As a result, the instruction that was given provided little in the way of guidance for the jurors as they attempted to determine if any of the defendant's agents or employees had violated the *standard of care applicable to their own particular specialty.* Tobin, 244 Mich App at 674-675.

This is exactly one of the two major issues that this Defendant has attempted to rectify since the trial court gave its instruction in 1994. It is exactly analogous to Judge Borradaille substituting the at issue neonatal nurse alleged to have allowed the UAC catheter to come out with the term "neonatal intensive care unit." This Defendant has attempted to explain to that trial court, and several appellate panels, that a "unit" cannot commit malpractice. The use of the word "unit" in an instruction simply fails to identify the health care providers at issue, just as the phrase "agents, servants, employees" failed to do so, in Tobin.

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Other case law is in accord. In Murdock v Higgins, 454 Mich 46 (1997), this Court reaffirmed that it is error to instruct a jury about an issue unsustained by the evidence or the pleadings. Murdock, 454 Mich at 60. In Murdock, a 15-year-old ordered by a juvenile court to perform community service was sexually assaulted by his supervisor at the agency to which he was assigned. A suit under numerous theories, including violation of the Child Protection Law, was filed. In evaluating whether or not the supervisor of the alleged assailant had a duty to the victim, the court dealt with whether there were proofs to justify the court's instruction under the Child Protection Law. In concluding that the statutory definitions under the provision did not apply to the supervisor under the facts of the case, the appellate court held that the Child Protection Law had no applicability. In reversing, this Court stated:

> In this case, the trial judge's instruction on Michigan's Child Protection Law only served to confuse the issues for the jury. Plaintiff argues that the instruction was not erroneous because Higgins introduced the topic and solicited testimony, albeit indirectly, on the duty to report. Regardless of who solicited testimony on the subject or first injected it into the case, Michigan law clearly provides that it is erroneous to instruct a jury on an issue unsustained by the evidence or the pleadings. Mills v Whitecastle Systems, Inc., (after remand), supra at 591. The statutory definitions within Michigan's Child Protection Law clearly do not apply to this defendant under the facts of this case.
> Murdock,454 Mich at 60-61.

Similarly, in this case, the injection by the trial court of the term "unit" into the 30.01 instruction could only have served to confuse the issues for the jury. As explained above, the definition of the unit was unsustained by the evidence in this case. This Court so ruled in Murdock even when the defendant allegedly introduced the topic and

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solicited testimony on this issue. In this case no such introduction by the Defendant occurred.

The bottom line is a "unit" is not a legally cognizable entity which has the capacity to enter into a relationship with a patient from which a duty arises. As the case law and treatises explain above, only individual persons with specialized skills can do so. By misidentifying the alleged health care professional against whom the malpractice claim is being asserted in 30.01, the trial court committed the most fundamental error it can make in a malpractice case. If left standing, this holding will completely unravel the basic concepts of malpractice law and even bring into question the very heart of all negligence law.

The Cox appellate decision is now in direct conflict with the Tobin decision. The Tobin case was correctly decided. Defendant urges this court to not only rectify the blatant error committed by the trial court and inappropriately affirmed by the appellate court, but to resolve this direct conflict that now exists in the Court of Appeals, in Defendant's favor.

B. Necessarily Misstates The Duty Of The Misidentified Alleged Tortfeasor Health Care Provider

The other key component to 30.01 is defining the duty that the health care professional alleged to have committed malpractice has to the patient. That duty is to act as a hypothetical peer of the same health care professional, "of ordinary learning, judgment or skill (and if the locality rule applies, "in this community or a similar one") would do under the same or similar circumstances." *As pointed out above, the trial*

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court completely omitted this defining phrase in the first paragraph given. In the second paragraph the trial court omitted the word "ordinary".

First, it is essential to point out that the error committed by misidentifying the health care professional extends to this aspect of the instruction. "Units" don't "do." In omitting the very definition of the conduct to which the health care profession is to be held, how is it possible for the jury to evaluate it? If the jury is to infer the definition from the second paragraph, what level of "learning, judgment or skill" is it to judge? As Judge Griffin points out in the dissent, the deletion of the limitation of the duty of "ordinary" care constitutes an unacceptable gross deviation from the standard jury instruction resulting in substantial injustice. The dissent aptly cites Johnson v Borland, 317 Mich 225, 231 (1947) wherein this Court stated:

> The law is well settled that a patient who is treated by a physician is entitled to a thorough and careful examination, such as the condition of the patient and the attending circumstances will permit, with such diligence and methods of diagnosis for discovering the nature of the ailment as are usually approved and practiced by medical men of **ordinary or average learning, judgment, and skill in that community or similar localities**. (Cite Omitted). [Emphasis added].

Judge Griffin, also, analogizes to legal malpractice in which this Court in Simko v Blake, 448 Mich 648, 656 (1995), explained that the "ordinary" care standard is an important limitation on a professional's duty. Referring to the same jury instruction, the court stated:

> According to SJI2d 30.01 all attorneys have a duty to behave as would an attorney of "**ordinary**" learning, judgment or skill..under the same or similar circumstances...

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> An attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill and ability **ordinarily** possessed by members of the legal profession. [Emphasis added].

See also, Cleveland v Rizzo, 99 Mich App 682,686 (1980).

In this case, what type of "learning, judgment and skill" is the jury to hold the misidentified health care professional? Was it extraordinary or ordinary or minimal?

Finally, the omission of the locality rule language ("this community or a similar one") is a third gross deviation from the jury instruction which should have been given in this case. This issue interfaces with the error dealt with more extensively in Issue II. As only non-specialist care was at issue in this case, to omit that language which applies to the locality rule constitutes a reversible error.

MCR 2.516(D)(2) states:

> (2) Pertinent portions of the Michigan Standard Jury Instructions (SJI) must be given in each case in which jury instructions are given if
>
> (a) they are applicable;
>
> (b) they accurately state the applicable law; and
>
> (c) they are requested by a party.

See also, Johnson v Corbet, 423 Mich 304 (1985).

A trial court must give a standard jury instruction if it is applicable and if it accurately states the law. Constantineau v DCI Food Equipment Inc., 195 Mich App 511, lv den'd, 441 Mich 925 (1992). In this case Defendants' proposed version of SJI2d 30.01 was obviously applicable and accurately stated the law, as follows:

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a neonatal nurse practitioner of ordinary learning, judgment, or skill in this community or similar one would do, or the doing of something which a neonatal nurse practitioner of ordinary learning, judgment or skill would not do, under the same or similar circumstances which you find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the neonatal nurse practitioner of ordinary learning, judgment or skill would do or not do, under the same or similar circumstances.

While the cases allow the trial court some leeway in these matters, deviations cannot result in substantial injustice to either party.

In this case, however, each conceivable pertinent portion of 30.01 was misstated by the trial court. Each, in and of itself, would warrant a reversal of the judgment and the granting of a new trial. Taken as a whole, the jury was presented with a misidentified health care professional, and without an appropriate definition of the duty that the misidentified professional had. It is inconceivable that such an error did not result in substantial injustice and a total deprivation of a fair trial for the Defendant.

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ISSUE II

THE COURT OF APPEALS ERRONEOUSLY AFFIRMED THE TRIAL COURT'S APPLICATION OF A NATIONAL STANDARD OF CARE TO NONSPECIALISTS, I.E., THE HOSPITAL'S NURSES AND, THEREBY, IMPERMISSIBLY ALLOWED UNQUALIFIED TESTIMONY OF PLAINTIFF'S EXPERTS, MODANLOU AND CRAWFORD.

Standard of Review

A trial court's decision to admit or exclude evidence is subject to the trial court's discretion and thus reviewed under an abuse of discretion standard. People v Bahoda, 448 Mich 261 (1995); Tiffany v Christman Co., 93 Mich App 267 (1979).

The trial court committed reversible error by applying a national standard of care to the hospital's nurses in direct derogation of this court's holding Bahr v Harper Grace Hospital, 448 Mich 135 (1995); MCL 600.2912a and numerous other decisions which require the applicability of the locality rule.

At trial, Plaintiff offered the expert testimony of Drs. Modanlou, a neonatologist from California, and Crawford, a neonatologist from New Jersey. At the time Plaintiff attempted to elicit standard of care testimony against the hospital's nurse, the defendant timely challenged each's qualifications to do so (See, TT, Vol I, pp 4-10; Vol IV, p 530) asserting that no foundation had been laid that each was qualified to give expert testimony under the locality rule. The trial court erroneously ruled that the locality rule did not apply to nurses by stating:

> THE COURT: What does this have to do with the hospital's - since she's not a party, I don't consider that a local standard is the requirement.

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MR. ROTH: Well, your honor, their case is against the hospital vicariously for the actions of its employees.

THE COURT: Well, but I still don't consider that you look solely at the standard of care of the nurse, you look at the hospital's standard of care which I consider as a general standard. TT, Vol I, p 6.

After explaining to the trial court the Court of Appeals holding in Bahr v Harper Grace Hospital, 198 Mich App 31 (1993) the trial court went on to state:

THE COURT: No, I am aware of the law. But the standard of care of the hospital is always going to be an issue when the hospital is not a solely owned hospital owned by one doctor or by one person, and so it's a general standard. I deny the motion.
TT, Vol I, p 7.

After citing the language on p 34 of the Court of Appeals decision in Bahr [198 Mich App at 34], which explicitly states that the locality rule applies to interns, residents and nurses, the trial court stated:

THE COURT: That's obiter dictum. They cite cases relative to residents and interns and I accept that. I accept that in your partner's previous case where he got hit with a $2 million judgment. And then they added, applicable standard of care for interns, residents and nurses. They add nurses and cite no case for nurses whatsoever. So I consider a nurse is clearly an agent of the hospital, and it would be a general standard of care. So I deny the objection.
TT, Vol I, p 10.

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Whatever sense one can make out of the trial court's ruling, it is clear that the trial court had a basic misunderstanding of the hospital's legal duty vis-a-vis its employees. As set forth in Issue I, the hospital is vicariously liable for its employees. When evaluating the treatment of its employees, one has to apply the appropriate legal and medical standard of care to each. The trial court inexplicably agreed that a resident or intern would be held to a locality rule as employees of the hospital but a nurse "as an agent of the hospital" would be held to a "general standard of care." This not only makes no sense, it is contrary to the clear law of this state. The majority's affirmation of this ruling is even more inexplicable and bespeaks a similar basic misunderstanding of the law in this area.

At the outset it must be clearly understood that Plaintiff's experts' testimony was restricted to criticisms of the hospital's nurses, particularly Nurse Plamondon, the one on duty at the time the UAC line was discovered to be dislodged. Plaintiff's expert, Dr. Modanlou's entire testimony, presented by video deposition, pertaining to his opinions about breaches of the standard of care appear in TT, Vol II, pp 38-45 of the deposition transcript itself. It is clear Dr. Modanlou's criticisms are restricted to Nurse Plamondon. See pp 38, 39, 40, 41 & 45.

Plaintiff's only other expert, Dr. Crawford, also restricted her criticisms to the nurse. See TT, Vol IV, pp 536-538. At no time during the entirety of the direct examination by Plaintiff's counsel of Dr. Crawford, is a physician of any kind criticized. This is critical to the backdrop of the error committed by both the trial court and the Court of Appeals.

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In this state by statute and case law, there is a different **legal** standard of care applicable to specialists versus "general practitioners", i.e. nonspecialists; Naccarato v Grob, 340 Mich 248 (1970); Thomas v McPherson Center, 155 Mich App 700, 708 (1986); Birmingham v Vance, 204 Mich App 418 (1994); Jalaba v Borovoy, 206 Mich App 17 (1994). In 1978, the Michigan Legislature enacted MCL 600.2912a which states, in pertinent part:

> (1) Subject to subsection (2), in an action alleging malpractice, the Plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> (a) the defendant, if a general practitioner, failed to provide the Plaintiff with the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the Plaintiff suffered an injury.
>
> (b) the defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the Plaintiff suffered an injury.

This Court in Bahr v Harper Grace Hospital, 448 Mich 135 (1995), affirmed the holding of the Court of Appeals in the same case, consistent with the statute cited above, by stating:

> The Court of Appeals said **and we agree** that the standard of care for general practitioners is that of the local community or similar communities and is nationwide for a specialist. The parties agreed, and the Court of Appeals

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> said, that interns and residents, as non-specialists, are held to a local standard of care of the local community or similar communities. [Emphasis added] Bahr, 448 Mich at 138.

While this Court reversed the decision in the Court of Appeals in Bahr, it did so on a very narrow basis, that being that the defendant hospital waited until **after** the expert had testified before challenging his qualifications, rather than conducting a voir dire examination on the witness stand or challenging the expert's qualifications before trial. See below.

In Bahr, both the Plaintiff's experts, Drs. Neilsen and Crane, testified they were familiar with the term "standard of care." Both, however, did not provide any testimony they were familiar with the requisite standard of care regarding residents, nor did they testify they were familiar with the standard of care with regard to residents in the Detroit community or similar communities. Bahr, 198 Mich App at 34-35. Likewise, here both Dr. Modanlou and Dr. Crawford were unable to articulate the standard of care with regard to nurses practicing in the Flint metropolitan area in 1990. Their background, training and experience did not provide them with any ability to enunciate this standard.

This Court in Bahr carefully examined exactly what occurred during the voir dire of Plaintiff's expert, and determined the defendant failed to engage in a proper voir dire examination at that time. This Court specifically agreed with the dissenting Judge in the Court of Appeals that:

> ...if there was a critical deficiency regarding the voir dire of Dr. Neilsen, it should have been brought to the attention of the judge....
> Bahr, 448 Mich App at 142.

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This Court in Bahr further stated that the defendant's lawyer declined an opportunity for voir dire concerning Dr. Neilsen's qualifications and that other objections did not concern Dr. Neilsen's qualifications respecting residents or interns. Bahr, 448 Mich at 143-144. In footnote 20 of this Court's opinion, the panel fully explains exactly what *occurred during this critical junction in the trial as follows:*

> ...the judge asked whether Harper Grace's lawyer wished to voir dire regarding the doctor's qualifications, and she responded, "No, I don't." The judge said that she was unclear whether Bahr's lawyers had provided a foundation respecting the **nurses** and suggested further inquiry. "As to interns and residents, I deny the motion."
>
> After Harper Grace's lawyers declined to voir dire Dr. Neilsen regarding his qualifications, and the Judge said that she was unclear whether Bahr's lawyer had provided the foundation respecting the **nurses**, Bahr's lawyer said that she would voir dire Dr. Neilsen regarding his familiarity with the **standard of care for nurses** with regard to carrying out orders for intravenous administration and monitoring of vital signs. When he concluded, Harper Grace's lawyers said she would like to voir dire him on the issue of **nurses**, and proceeded to do so. The lawyer did not voir dire concerning Dr. Neilsen's qualifications respecting residents or interns. [Emphasis added] Bahr, 448 Mich at 143, fn. 20.

This Court also commented that:

> Harper Grace did not complain, before Neilsen testified about the errors of omission and commission, that there had been no reference to the standard of care for residents and interns in Detroit or similar communities. Nor did it so particularize in its motion for a directed verdict or its motion for judgment notwithstanding the verdict. Bahr, 448 Mich at 144.

This Court considered these failures to be of prime importance in reversing the Court of Appeals and holding Dr. Neilsen qualified to testify in that case. Moreover, this court in Bahr specifically found an inference drawn on appeal by the defendant:

> ...should have been drawn and articulated on the record before the Judge ruled shortly thereafter that Dr. Neilsen was qualified concerning the standard of care applicable to residents and interns, and may not be urged for the first time long after Dr. Neilsen had concluded his testimony.
> Bahr, 448 Mich at 145.

Here, defense counsel timely and immediately moved the trial court to rule on the foundation of the testimony of Drs. Modanlou and Crawford. That which this Court found lacking in Bahr, therefore, certainly was present here.

It is important to note that in Bahr, the expert witnesses were critical of the nursing care, and were required to express and enunciate knowledge of the **local** standards of care applicable to nurses.

In Whitney v Day, 100 Mich App 707 (1980), a nurse anesthetist was held to a local rather than national standard of care. Whitney, 100 Mich App at 711-712. The Court of Appeals held the nurse anaesthetist to a local standard even while acknowledging a nurse anesthetist possesses greater responsibilities, certification and education than an ordinary nurse. Id. Even more incredibly, the trial judge in Whitney, is the very same trial judge here! Obviously, he either forgot or incorrectly changed his mind.

Curiously, the majority totally ignores this issue. It does not even acknowledge the existence of Bahr, let alone attempt to distinguish it. Instead, it piggybacks the fallacious premise that the Plaintiff has properly set forth a theory against a "team" or "unit". By buying into this legal absurdity, it misguidedly discusses the efficacy of testimony by experts as to whether or not an NICU is held to a national standard. There is no legal relevancy to such an issue. As discussed infra pp 17-18, Tobin, 244 Mich

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App at 672, fn 24. Neither factual witnesses nor medical experts in malpractice cases determine the legal standard of care that is applicable. To state the obvious which regrettably needs stating -- legal duty is an issue of law. Moning v Alfono, 400 Mich 425, 436-437 (1977). Moreover, the question of whether a national standard or a local community standard applies is a legal one for the court as opposed to a factual one for an expert. Estate of Bradford v O'Connor Chiropractic Clinic, 243 Mich App 524, 531 (2001).

One major source of the majority's confusion is its inability to distinguish between the concepts of legal versus medical standards of care. The Bahr holding and MCL 600.2912a provide the rule of law that the standard of care applicable to a specialist is different from that applicable to a nonspecialist. See MCL 600.2912a and Bahr, supra. The former is held to a national standard and the latter to a local standard. Therefore, an expert must be qualified with the requisite knowledge, experience and training to render such testimony.

It is legal sophistry for the majority to suggest that while Defendant did not have the burden of proof to demonstrate a standard of care (actually no one has that burden of proof since it is a question of law), the Defendant's failure to present proofs in a separate record that the standard of care is governed by a local standard has some legal significance. This entirely misconstrues the legal issue at hand. Cox, 243 Mich App at 82-83. As an aside, an evidentiary offer of proof is not appropriate let alone required on an issue of law. See, MRE 103(a).

Parenthetically, it should be noted that the overt reliance by the majority on Greathouse v Rhodes, 242 Mich App 221 (2000) for the conclusion the Defendant

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"forfeited" the issue of plaintiff's expert's unfamiliarity with the local standard of care (Cox, 243 Mich App at 80) had obviously been vitiated by this Court's reversal of Greathouse. By order of October 10, 2001, this Court in Greathouse, docket no. 117898, reversed the judgment of the Court of Appeals in Greathouse, supra, insofar as it held that plaintiff forfeited her challenge to defendant's expert witness by not filing the motion until a month before trial. As a consequence, the majority's seemingly primary basis for rejecting defendant's arguments on this issue has been utterly abrogated.

Gleaned to its essentials, the record demonstrates the following:

(a) The trial court erroneously applied a national standard to nurses;

(b) Plaintiff's counsel laid no foundation that her experts were qualified to render locality rule standard of care testimony. In spite of this, the trial court permitted such testimony to which objection was properly preserved. In fact, the majority candidly acknowledges that neither of Plaintiff's experts, Modaniou nor Crawford were familiar with the local standard of care of nurses. Cox, 243 Mich App at 75;

(c) Therefore, had the proper rulings been made, Plaintiff would not have been able to proffer a prima facie case and Defendant would have obtained a directed verdict. Minimally, by allowing the unqualified testimony, the Defendant was deprived of a fair trial.

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ISSUE III

AN AMALGAMATION OF MISSTATEMENTS OF LAW AND FACTS COUPLED WITH APPELLATE INSUBORDINATION IN THE GUISE OF UNWARRANTED ATTACK ON DEFENSE COUNSEL RENDERS NUGATORY ANY LEGAL VALIDITY TO THE MAJORITY'S OPINION AND IF ALLOWED TO STAND WOULD BE INCONSISTENT WITH SUBSTANTIAL JUSTICE.

Standard of Review

A trial court's decision to admit or exclude evidence is subject to the trial court's discretion and thus reviewed under an abuse of discretion standard. People v Bahoda, 448 Mich 261 (1995); Tiffany v Christman Co., 93 Mich App 267 (1979).

Mischaracterizations, misrepresentations and inaccurate application of fundamental legal principles on several levels can only be explained by the majority's outright rejection of this Court's conclusion that the procedural posture of this case was appropriate. Defendant feels compelled to respond as follows.

A. Misstatements Re: Defendants Proofs Supporting Nurse Plamondon

The majority states in fn 6, (Cox, 243 Mich App at 87) that Defendant did not present a nurse to testify regarding the local standard of care to justify Nurse Plamondon's actions. The case law did not, in 1994 nor now, require a nurse to testify on behalf of a nurse. A specialist may testify regarding the conduct of a non-specialist if that specialist has the requisite knowledge and qualifications to do so. Siirila v Barrios, 398 Mich 576 (1976); Bahr, supra. As Plaintiff had the burden of proof and also did not

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utilize a nurse to criticize Nurse Plamondon, this one-sided statement is quite peculiar in addition to being legally irrelevant.

The majority further states, erroneously, that the "defense of the action consisted of neonatologists who did not comment on the propriety of Nurse Plamondon's actions and any fifteen to twenty minute delay in rendering treatment...". Cox, 243 Mich App at 87, fn 6.

At pp 36-37 of his testimony, however, Steven Donn, M.D., Defense expert, testified, in every conceivable manner, that Nurse Plamondon complied with applicable standards of care. In pertinent part, Dr. Donn stated:

> Q. Now, Dr. Donn, do you have an opinion as to whether or not Nurse Martha Plamondon complied with applicable standards of care regarding her involvement in the care of Brandon Cox on February 10, and specifically, with regard to any responsibility she would have had regarding the monitoring and securing of the UAC line?
>
> A. Yes, sir, I do.
>
> Q. And what is that opinion?
>
> A. I believe that she met the applicable standards as they exist.
>
> Donn transcript, pp 36-37.

Dr. Donn also testified concerning the entirety of the individuals who came in contact with the minor Plaintiff in the NICU, as follows:

> Q. Let me ask you the same question. Do you have an opinion as to whether or not the NICU staff at Hurley Medical Center, whether that be a physician or a nurse, who had any contact with Brandon regarding the placement, securing and monitoring of this line from the time of February 8 until the line was

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discovered being dislodged on February 10 at about 4:20, as to whether or not any of those individuals, as you review the chart, complied with the applicable standards of practice regarding placement, securing and monitoring of that line?

A. Yes, sir, I do.

Q. And what is your opinion?

A. My opinion is that there were no violations in that standard of care by any of the personnel. Id.

The specific criticism levied at the Defendant, and the majority in this context (that no one commented on Nurse Plamondon's alleged delay) was also clearly addressed by Dr. Donn:

Q. Now, Dr. Donn, do you have an opinion, based upon your education, training and experience, as to whether or not Nurse Plamondon acted in compliance with the standard of practice that would be applicable to her in 1990 in the manner in which she responded to this UAC line becoming dislodged?

A. Yes, sir.

Q. And what is that opinion?

A. I believe she complied with the expected procedures and the standard of care. Donn transcript, p 43.

In spite of the legal irrelevancy of this as well, how is it that the majority missed such key testimony?

B. Misstates Dr. Donn's Testimony Regarding National Standard of Care for Level III NICU

The majority stated, at least three times in its Opinion (Cox, 243 Mich App at 82), that Dr. Donn, defense expert, agreed with Plaintiff's experts that a national standard of

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care applied to Level III NICUs. In spite of its legal irrelevancy, as explained in the earlier issues, this assertion is simply false. Dr. Donn's testimony in this regard is as follows:

> Q. Is Hurley a Level III?
>
> A. Yes, sir.
>
> Q. And I take it that it's your testimony that at Level IIIs, you would expect the standard of care to be a nationwide one? In other words, if you're examining conduct in a Level III, you can testify as to breaches of the standard of care as to what the standard of care is whether that Level III is in Ann Arbor, Michigan, Flint, Michigan, Long Beach, California, or anywhere in between?
> Donn testimony, pp 126-127.

At this point, defense counsel objected because the above question asked for a legal conclusion and did not specify the type of healthcare provider Dr. Donn was asked about in terms of the standard of care. Defense counsel further indicated his objection which Plaintiff cured, as follows:

> MR. ROTH: Level IIIs don't provide care. People provide care, and they have different designations, physicians, nurses, respiratory therapists.
>
> MR. LEUCHTMAN: Well, that's the next question, Rob. Let him answer this one and I'll get to that.
> Donn testimony p 127.

Because Plaintiff's counsel indicated he would cure the objection, both the objection and the statement by Plaintiff's counsel were stricken from the record when read to the jury. Dr. Donn went on to testify in response to the above question:

> THE WITNESS: I think that for the most part that is correct, understanding that there are

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> going to be individual variations depending on certain aspects that may be unique to one unit and not another.

BY MR. LEUCHTMAN, CONTINUING:

> Q. And would that hold true, **not only of physicians** but as you previously testified, other staff folks including but not necessarily limited to nurses, respiratory therapists, etc?
>
> A. **Not necessarily**. You see, again, there are some Level III units which are staffed by pediatricians rather than neonatologists or nurse practitioners rather than neonatologists because of either geographic or economic considerations, and those people, again, do not have the same Level of training or expertise as does a board certified neonatologist. So it is going to differ from one unit to the next. [Emphasis Added] Donn testimony, pp 127-128.

It is clear, therefore, that the majority improperly read and erroneously interpreted Dr. Donn's testimony by stating in the Opinion that he unequivocally testified a national standard of care applied. He did not. Instead, in the context in which the questions were asked, inquiry was first made of Dr. Donn regarding **physicians**, and he appropriately responded that a national standard of care applied. He was then asked about other healthcare providers in the NICU, and again appropriately responded that the standard of care is different for those actors then it would be for a board certified neonatologist. Through this error, the majority attempts to bootstrap its misstatement of well-established medical malpractice law to the perceived testimony of Defendant's expert.

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C. Appellate Insubordination In The Form Of Attack On Defense Counsel's Integrity.

Most revealing is the majority's clear anger at the Supreme Court for allowing Defendant the opportunity to have its substantive issues heard by a court after more than five years. The majority accuses Defendant of having unclean hands and improperly pursuing this appeal. Most notable, however, is the majority doing so AFTER this Court has ruled in this case that the defense counsel acted properly in preserving its issues for appeal. Without reiterating this detailed chronology which Judge Griffin, in his dissent of the Unpublished Opinion of the Court of Appeals dated April 6, 1999 completely addresses, this Court per its Order of May 16, 2000 unequivocally ruled:

> In these unique circumstances, it would be unjust for the court to refuse to rule on these issues **which defendant has properly and persistently raised**. Cox, 462 Mich at 860. [Emphasis added]

Yet, in what can only be interpreted as a slap in the face of this Court, the majority spends four pages of its Opinion revisiting this issue and taking defense counsel to task personally. Cox, 243 Mich App at 91-94. What is most unwarranted is the rank speculation as to defense counsel's motives in the manner in which this appeal was pursued. The majority accuses in the following manner:

> The lack of an explanation for the conduct and the failure to substantiate conduct with citation to the court rules **COULD** [emphasis added] indicate that defendant was attempting to lengthen the time frame for resolution of any decision in an attempt to force plaintiff to settle the litigation. Cox, 243 Mich App at 93. [Emphasis added]

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It then accuses the Defendant of unclean hands a second time. Cox, 243 Mich App at 94.

The undersigned takes extreme exception to this purely speculative attack on his integrity. It flies directly in the face of this Court's ruling that the issues were properly preserved. It also appears to be violative of Canon II of the Michigan Code of Judicial Conduct which, in pertinent part, states:

> B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

The majority's attack on defense counsel's integrity based upon admitted speculation (use of the word "could") is clearly conduct which is contrary to both courtesy and respect. Nor does it respect or observe the very law of this case in which this Court has ruled defense counsel's legal filings to have been proper. Defense counsel urges this Court to specifically refute and reject this type of conduct on the part of these two appellate judges, as well as to supersede their admonition to the bar which, in effect, warned all attorneys in the state not to follow this Court's ruling.

D. Public Policy Considerations

If the Court of Appeals opinion in Cox is allowed to stand, the health care industry will face the very clear prospect of claims against various organizational constructs within hospitals, such as a coronary care units or pediatric intensive care units. Such claims would wade into a legal never-never land as there exists no legal frame of reference to evaluate such a claim. It alters the fundamental notion of

malpractice law that a duty only arises between an individual provider and his or her patient. The confusion addressed by the Tobin court simply reflects reality. There are multiple medical specialties involved in these units with multiple standards of care applicable to each. A respiratory technician checking in on a patient in a coronary care unit cannot in any way be held to a standard of care of a cardiologist who is attending the same patient, even if that cardiologist has overall responsibility of the patient. Such a notion will lead to legal chaos and flies in the face of medical reality. The Defendant urges this Court to avoid such a prospect.

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SYNOPSIS

By virtue of both substantive and equitable considerations, the scenario before the Court at this time can be reasonably characterized as follows:

- A divided appellate panel devotes four pages of its Opinion admonishing the bar to essentially disregard this Court's ruling in Cox v Flint Board of Hospital Managers, unpublished opinion per curium issued November 22, 1996 (docket no, 184859), in what could only be described as rank insubordination [Cox, 243 Mich App at 91-94];

- In doing so, the majority clearly undermines its ability to review the substantive issues in an objective manner -- issues which go to the very core of what constitutes a medical malpractice claim;

- Upheld the wrong (applied national versus locality rule) standard of care applicable to nurses in direct contravention of this Court's ruling in Bahr, supra;

- Upheld a SJI2d 30.01 instruction in direct contravention of the recent Tobin, supra decision, and in direct contravention with established case law heretofore;

- Opens the door to an entirely new realm of claims against organizational constructs within hospitals, such as "units" heretofore unknown in medical malpractice law.

Any one of these would be a good reason to reverse the Court of Appeals. Cumulatively, Defendant respectfully suggests an overwhelming case is made for reversal.

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RELIEF REQUESTED

For these reasons, Defendant-Appellant, Board of Hospital Managers for the City of Flint, d/b/a Hurley Medical Center prays this Honorable Court;

(1) Enter a peremptory Order of Reversal of the Court of Appeals Opinion in Cox v Flint Hospital Board of Managers (on remand), 243 Mich App 72 (2000), and enter a directed verdict on behalf of Defendant; or, in the alternative

(2) Enter a peremptory Order of Reversal of the Court of Appeals opinion, adopt the dissenting Opinion of the Honorable Richard Allen Griffin and remand this matter to Genesee County Circuit Court for a new trial.

Respectfully submitted,

PORTNOY & ROTH, P.C.

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